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No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

KNOX COUNTY EDUCATION ASSOCIATION,
Petitioner,
v.
KNOX COUNTY BOARD OF EDUCATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, on the basis of a court's "common sense and experience with life" and "intuitive understanding"—without a job-specific evidentiary showing—public school teaching positions can be classified as inherently "safety sensitive" so as to justify suspicionless drug testing under the Fourth Amendment.

2. If the answer to Question number 1 is "no," whether respondent Knox County Board of Education made the type of evidentiary showing that is necessary to justify suspicionless drug testing of its teachers when there is no evidence in the record to indicate (a) that there is a problem of drug use among the school system's teachers, (b) that any teacher ever has failed to properly perform the duties that allegedly could be affected by drug use, (c) that those duties are of such a nature that undetected drug use would seriously affect a teacher's performance, and (d) that tests based on individualized suspicion would be ineffective in identifying any teacher whose ability to perform the duties in question might be impaired by drug use.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit in *Knox County Education Association v. Knox County Board of Education*, 158 F.3d 361 (6th Cir. 1998).

OPINIONS BELOW

The opinion of the Sixth Circuit panel is reported at 158 F.3d 361, and is reproduced in the Appendix to this Petition ("App.") at 1a. The order denying rehearing and rehearing en banc is unreported and is reproduced at App. 83a. Judge Gilman, with whom Chief Judge Martin and Judges Daughtrey and Cole joined, wrote a dissent from the denial of rehearing en banc, which is unreported

and is reproduced at App. 84a. The district court's opinion is unreported and is reproduced at App. 57a.

JURISDICTION

The Court of Appeals entered judgment on June 11, 1998, and denied rehearing and rehearing en banc on February 4, 1999. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides in pertinent part that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ."

STATEMENT OF THE CASE

A. The Knox County Drug-Testing Policy

Respondent Knox County Board of Education ("Board") operates a public school system comprised of fifty-three elementary schools and thirty-five middle and high schools. The system employs thirty-two hundred teachers. App. 3a. Petitioner Knox County Education Association ("KCEA") represents the professional employees in the school system.

On June 1, 1994, the Board adopted a "Drug-Free Workplace Substance Abuse Policy" ("Knox County Policy," or "Policy"). One part of the Policy, not at issue here, provides that all school employees are subject to being tested upon reasonable suspicion of drug impairment. App. 9a, 10a-13a. The part of the Policy challenged here requires that persons applying for positions designated by the Board as "safety sensitive" must undergo drug testing by urinalysis, after they have been offered a

position but before their employment has commenced, notwithstanding the absence of any suspicion of drug use.[1] This requirement applies both to persons not yet employed by the school system and to current employees who seek to transfer to "safety sensitive" positions (including those who already hold a position designated as "safety sensitive" but who wish to transfer to a different "safety sensitive" position). App. 9a-10a.

The Board has designated a broad range of positions as "safety sensitive," including principals, assistant principals, teachers, teacher aides, substitute teachers, school secretaries and school bus drivers. However, in upholding the suspicionless drug testing program, the court of appeals focused on teachers, and we will do likewise in this petition.

Although the testing procedures in the Knox County Policy are modeled in certain respects on the Department of Transportation's Regulations on Workplace Testing Programs, 49 C.F.R. Part 40, *see* App. 14a, 43a, they depart markedly from the DOT regulations in the range of substances that are screened. The DOT regulations allow testing only for marijuana, cocaine, opiates, amphetamines, and phencyclidine, all of which are classified as Schedule I, II, or III drugs under the Controlled Substances Act, 21 U.S.C. § 812. *See* App. 42a-43a. The Knox County Policy, in contrast, tests for eighteen different drugs, most of which "can be found in common medicines," *id.*, and which are classified in Schedules IV and V because they "have an accepted medical use and a lower potential for abuse." *Id.* The DOT regulations "have specifically rejected allowing employers to test for

[1] The Policy also calls for alcohol testing. Because the court of appeals held that the Board had not justified that part of the Policy, App. 53a-56a, it is not at issue in this petition.

[such] additional drugs," because, *inter alia*, "[t]esting for additional drugs increases the privacy intrusion of testing," and "uniform standards crucial to the accuracy and integrity of the testing process . . . are not now in place for the additional drugs." App. 43a-44a, quoting 49 C.F.R. Part 40.

An applicant who refuses to complete the drug testing procedure, or who tests positive, is not allowed to hold a "safety sensitive" position, with one exception: if it is determined that an individual who tested positive for any of the eighteen covered substances had a lawful prescription for a medication containing the substance, the test is considered negative, and the individual is allowed to hold a "safety sensitive" position, regardless of the possible effects of the medication on the individual's mental or physical capacities. App. 10a, 13a.[2]

B. The Evidence Regarding the Policy's Alleged Relationship to Student Safety

As the court of appeals acknowledged, "there is no empirical or historical evidence of an ongoing [drug] abuse problem [among Knox County's teachers] . . . or evidence of a newly blossoming epidemic of abuse." App. 27a. *See also* App. 17a. Nevertheless, the Board contends that drug testing of teacher applicants is necessary to protect student safety.

To depict the nature and extent of the safety issues allegedly at stake, the Board submitted records for the 1995-96 school year from its Security Department, which,

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[2] However, the substance for which an individual has tested positive is not disclosed to the individual. Consequently, as Section 12 of the Policy expressly acknowledges, the only way an individual who has tested positive can seek to establish that the positive result does not reflect unlawful drug use is to "disclose . . . *all* drugs taken by prescription."

as the court below noted, "reports all incidents, whether criminal or not, that implicate the safety and security of students or staff." App. 5a-6a. Those records showed no incidents of unlawful or violent conduct in any of the fifty-three elementary schools. App. 6a. Of the thirty-five middle and high schools, there were no instances of violent conduct at twenty of them, *id.*; and most instances of non-violent but unlawful conduct that allegedly implicated safety or security likewise occurred at a small number of the schools. *See* Def. Exh. 2(A-B).

The Board did not submit any evidence regarding the role, if any, that teachers are expected to play in dealing with student behavior that may implicate safety or security, other than the fact that teachers are expected to report any violent behavior, drug use, weapons, or other misconduct that they happen to observe. *See* App. 5a, 30a, 37a, 49a.[3] As the court of appeals acknowledged, there is "[no] evidence that the inattentiveness or negligence of a teacher has ever contributed to, or was related in any way, to [any] assaults or to any security incident." App. 6a. "Again, there is no record evidence that a teacher has ever failed to report a student for the use or possession of drugs, alcohol or weapons." *Id.* The Board "has not been able to cite any one specific example in which a teacher or other employee responsible for children has allowed any harm to the children by being in an impaired condition while on the job." App. 38a.

Having failed to present any evidence regarding the duties of teachers that allegedly implicate safety, the Board likewise failed to present any evidence as to how drug use—much less drug use of a nature that would not be discovered through reasonable-suspicion testing—might

[3] However, the chief reporting obligation rests with "a principal or administrator." App. 5a.

render a teacher incapable of performing his or her "safety" functions, whatever they might be. The testimony by the Board's witnesses on that subject was confined to generalizations about the value of a teacher's "be[ing] on [her] toes every minute with every youngster." App. 5a. *See infra* at 16-19.

C. The Decisions Below

KCEA filed suit to enjoin the Knox County Policy as violative of the Fourth Amendment. Noting the absence of any evidence to support a safety need for the Policy's suspicionless drug testing, the district court struck down that part of the Policy. App. 74a-77a.

The Sixth Circuit reversed, declaring that "common sense and experience with life," App. 37a, and the panel's "intuitive[] understanding[ing]," App. 38a, n.23, were sufficient to enable the panel to determine that drug testing of teachers is essential to satisfying a school district's "statutory obligation to insure the safety and welfare of the children." App. 38a.

As to why the Board's *reasonable suspicion* testing program would not adequately serve that asserted interest, the panel opined, without reference to any record evidence, that teachers are not subject to regular scrutiny by "their peers and others," but only by students, "some of whom are very young, who may nor may not be able to detect drug use among teachers," and who, if they did detect such use, "would likely be wary of reporting such conduct." App. 30a-31a.

The panel concluded its analysis by declaring that because teachers are "role models . . ., mentors, friends, and in some cases, parent-figures that stand in the place of absent parents," they "must expect" to be subject to suspicionless drug testing. App. 50a-51a.

The Court of Appeals denied KCEA's petition for rehearing and for rehearing en banc. App. 83a. Four judges dissented from the denial of en banc rehearing, concluding that the panel decision is contrary to this Court's decision in *Chandler v. Miller*, 520 U.S. 305 (1997). The dissenters stated:

> The fact that public schools are heavily regulated in terms of what they can teach and how students and teachers may behave does not justify requiring teachers to sacrifice personal liberties based upon safety considerations that are not relevant to the school environment.
>
> * * * *
>
> The present case is . . . distinguishable from the cases in which the [Supreme] Court has found exceptions to the requirement of individualized suspicion. The policy at issue is not justifiable due to safety concerns, nor due to any claim that teachers should forfeit a normal expectation of privacy. It is, in fact, very similar to the policy struck down in *Chandler*. In that case, as in this one, the officials in question were charged with important responsibilities that affected a great number of people. In that case, as in this one, drug use would interfere with the official's ability to carry out the mission of his or her position. In neither case, however, was there a time-critical safety component of the job that sufficed to override the Fourth Amendment's requirement of particularized suspicion.
>
> What, then, justifies the Board's drug-testing policy? In *Chandler* . . ., the court made the following comment upon the justification for testing candidates for elected office:
>
> > What is left, after close review of Georgia's scheme, is the image the State seeks to project. By requiring candidates for public office to sub-

> mit to drug testing, Georgia displays its commitment to the struggle against drug abuse.
>
> * * * *
>
> [T]he result reached by the panel can only be justified as a political statement that drug use by teachers is unacceptable to the Knox County Board of Education. Although such a statement is laudable, it does not constitute a justification for abridging teaching candidates' freedom from unreasonable searches.
>
> * * * *
>
> The lesson of *Chandler* is that, in the absence of particularized suspicion, an immediate safety concern, or evidence of a higher likelihood of drug abuse among persons with a decreased expectation of privacy, drug testing violates the Fourth Amendment. Because none of these exceptions applies to teaching candidates, *Chandler* requires that the Board's policy be held unconstitutional.

App. 85a-88a.

REASONS FOR GRANTING THE WRIT

In holding that teachers in the Knox County school system occupy positions as to which suspicionless drug testing is justified under the Fourth Amendment, the Sixth Circuit has taken a position that is in conflict with this Court's teachings in *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989), and its progeny—including particularly *Chandler*. Nor is the significance of the Sixth Circuit's decision limited to Knox County. Because the court did not base its decision on record evidence as to the functions actually performed by teachers in the Knox County school system—but relied rather on "common sense and experience with life" and "intuitive understanding"—the decision necessarily stands for the far-reaching proposition that public school teaching positions are in-

herently "safety sensitive," and that it therefore is constitutionally permissible to subject public school teachers in school systems throughout the nation to suspicionless drug testing.

Moreover, insofar as the decision below purports to indicate the type of evidentiary showing that the Government must make in order to justify suspicionless drug testing, it raises a question that has implications for *all* public employers and public employees, and one as to which the Justices of this Court have expressed somewhat divergent views.

The instant case offers this Court an appropriate and timely opportunity to provide guidance with regard to these important questions of Fourth Amendment jurisprudence, and to clarify (1) whether public school teachers categorically are subject to suspicionless drug testing without a job-specific evidentiary showing, and (2) if not, the type of evidentiary showing that must be made by a school system—or, indeed, by any public employer—that seeks to subject its employees to suspicionless drug testing.

1. We start with common ground. Drug tests conducted by public officials through urinalysis constitute searches for purposes of the Fourth Amendment. *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 617 (1989). "For most of our constitutional history, mass, suspicionless searches have been generally considered *per se* unreasonable." *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 667 (1995) (O'Connor, J., dissenting). And, in the context of drug testing by public officials, this Court has recognized only a "closely guarded category of constitutionally permissible suspicionless searches." *Chandler*, 520 U.S. at 309.

A suspicionless testing program cannot be sustained unless it strikes a proper balance between governmental

interests and privacy concerns. This Court has explained that "[i]n limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion." *Id.* at 314, quoting *Skinner*, 489 U.S. at 624. But, absent proof of a "special need . . . sufficiently vital to suppress the Fourth Amendment's normal requirement of individualized suspicion," *Chandler*, 520 U.S. at 318, the balance must be drawn against the testing program. "[W]here . . . public safety is not genuinely in jeopardy, the Fourth Amendment precludes the suspicionless search, no matter how conveniently arranged." *Id.* at 323.[4]

2. This Court's decisions from *Skinner* to *Chandler* make it plain that the "special needs" requirement obligates the government, if it wishes to engage in suspicionless drug testing, to establish that drug use by the persons sought to be tested poses a genuine threat to important governmental interests, and that a program of testing based on individualized suspicion could not adequately protect those interests.

a. In *Skinner*, which concerned regulations of the Federal Railroad Administration ("FRA") that required testing when an employee had been involved in a train accident, it was "undisputed that . . . [the] covered employees are engaged in safety-sensitive tasks." *Skinner*, 489 U.S. at 620. Because a railroad employee's mental and physical condition can affect his ability to perform those tasks, the employees long had been subjected to extensive

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[4] *See also 19 Solid Waste Dept. Mechanics v. City of Albuquerque*, 156 F.3d 1068, 1072 (10th Cir. 1998) ("If the government has not made its special needs showing, then the inquiry is complete, and the testing program must be struck down as unconstitutional").

regulations to insure their health and fitness for duty, including comprehensive periodic physical examinations. *Id.* at 627-28 and n.8.

It likewise was established on the record in *Skinner* that drug and alcohol use posed a grave threat to the safe operation of the nation's railroads. A locomotive "becomes lethal when operated negligently by persons who are under the influence of alcohol or drugs." *Id.* at 628. The FRA found that "from 1972 to 1983 'the nation's railroads experienced at least 21 significant train accidents involving alcohol or drug use as a probable cause or contributing factor,' and that these accidents 'resulted in 25 fatalities, 61 non-fatal injuries, and property damage estimated at $19 million.'" *Id.* at 607 (quoting FRA findings). *See also Chandler*, 520 U.S. at 314-15 (discussing *Skinner*).

The record in *Skinner* established as well that "[t]esting without a showing of individualized suspicion was essential . . . if [the government's] vital interests were to be served." *Chandler*, 520 U.S. at 315. "Employees subject to the tests discharge[d] duties fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences. Much like persons who have routine access to dangerous nuclear power facilities . . ., employees who are subject to testing under the FRA regulations can cause great human loss before any signs of impairment become noticeable to supervisors or others." *Skinner*, 489 U.S. at 628. Furthermore, "imposing an individualized suspicion requirement for a drug test in the chaotic aftermath of a train accident would seriously impede an employer's ability to discern the cause of the accident; indeed, waiting until suspect individuals could be identified 'likely would result in the loss or deterioration of the evidence furnished by the tests.'" *Chandler*, 520 U.S. at 315, quoting *Skinner*, 489 U.S. at 631.

b. In *Treasury Employees v. Von Raab*, 489 U.S. 656 (1989), this Court upheld suspicionless drug testing of Customs Service employees "engaged directly in drug interdiction, and . . . those who otherwise are required to carry firearms." *Id.* at 668. This Court emphasized that employees in those positions are exposed to the criminal element and to "vast sources" of illegal drugs. *Id.* at 669. Their work involves both great physical danger and significant exposure to bribery and blackmail. *Id.* at 669-70. Several Customs officers had been killed in the line of duty, and many others had been the targets of bribery by drug smugglers or had been involved in other integrity violations. *Id.* In those unique circumstances, the Court agreed with the Customs Service that the use of drugs by "front-line interdiction personnel," *id.* at 670, and by other personnel whose positions required them to carry firearms, *id.*, posed real and substantial threats to the proper performance of their duties.

As in *Skinner*, this Court approved the suspicionless testing program in *Von Raab* only after making the additional determination that "[i]ndividualized suspicion would not work in this setting." *Chandler*, 520 U.S. at 316 (discussing *Von Raab*). It was "not feasible to subject [Customs] employees and their work product to the kind of day-to-day scrutiny that is the norm in more traditional office environments." *Von Raab*, 489 U.S. at 674. What is more, to the extent that supervisors could observe Customs agents on the job, reasonable-suspicion testing still would not be sufficient to serve the government's legitimate interests, because on-the-job observation would not reveal whether an employee was using drugs *off* the job; and "the almost unique mission of the Service gives the Government a compelling interest in ensuring that many of these covered employees do not use drugs even off duty, for such use creates risks of bribery and black-

mail against which the Government is entitled to guard." *Id.*

Given those unique facts, the Court's narrow opinion in *Von Raab* is "[h]ardly a decision opening broad vistas for suspicionless searches." *Chandler*, 520 U.S. at 321.[5]

c. In *Vernonia School Dist. 47J v. Acton*, this Court upheld suspicionless drug testing of students participating in a school district's athletics program. As this Court observed, searches of students are, as a general matter, subject to a lesser requirement of suspicion than other searches, because of the need for flexibility and informality in student disciplinary matters. *See New Jersey v. T.L.O.*, 469 U.S. 325, 340-43 (1985). Furthermore, students who choose to engage in athletics voluntarily give up much of their privacy, especially with respect to their physical functions. *See Vernonia*, 515 U.S. at 656-57. For these reasons, this Court upheld the testing of student athletes in *Vernonia*, but only after determining (i) that drug use could cause special harm to the student athletes whose health the school district was charged with protecting, *id.* at 662, and (ii) that the district had experienced an "immediate crisis" caused by "a sharp increase in drug use," with student athletes serving as "leaders of the drug culture." *Id.* at 648-49, 663. *See Chandler*, 520 U.S. at 316-17.

This Court further concluded in *Vernonia* that testing based on individualized suspicion would not have been

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[5] Even so, this Court found *Von Raab* to be a close case, and dissents were filed not only by Justices Marshall and Brennan, who had dissented in *Skinner*, but also by Justice Scalia, joined by Justice Stevens, both of whom had voted with the majority in *Skinner*. Justice Scalia opined that the record in *Von Raab* did not contain "real evidence of a real problem that will be solved by urine testing of Customs Service employees." 489 U.S. at 681 (Scalia, J., dissenting). He characterized the majority opinion as resting on "speculation," *id.* at 682, and "symbolism," *id.* at 687.

practicable, because the accusatory nature of such a process would be unacceptable to parents, and would "add[] to the ever-expanding diversionary duties of schoolteachers the new function of spotting and bringing to account drug abuse, a task for which they are ill prepared, and which is not readily compatible with their vocation." *Vernonia*, 515 U.S. at 664.[6]

d. In its subsequent decision in *Chandler*, this Court confirmed what was implicit in *Skinner*, *Von Raab* and *Vernonia*: the category of cases in which suspicionless drug testing is constitutionally permissible is indeed "closely guarded." *Chandler*, 520 U.S. at 309.

This Court held in *Chandler* that Georgia had not established a "special need" to justify testing candidates for high state office. Georgia argued that the use of illegal drugs by public officials "draws into question an official's judgment and integrity; jeopardizes the discharge of public functions, including antidrug law enforcement efforts; and undermines public confidence and trust in elected officials." *Id.* at 318. This Court found, however, that "[n]othing in the record hints that the hazards respondents broadly describe are real and not simply hypothetical for Georgia's polity." *Id.* at 319.

This Court further reasoned that because candidates are subject to "day-to-day scrutiny," it was not essential for the state to insist on suspicionless testing. *Id.* at 321. Georgia's desire that its public officers project a drug-free "image" could not justify suspicionless drug testing, this Court explained, because that objective was "symbolic,

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[6] Justice O'Connor, joined by Justices Stevens and Souter, dissented in *Vernonia*. She argued, *inter alia*, that reasonable-suspicion testing would be feasible, *id.* at 674-80 (O'Connor, J. dissenting), and that, whatever might be the case regarding Vernonia's high school, there was insufficient evidence of a drug problem in the *elementary* school. *Id.* at 684-85.

not 'special,' as that term draws meaning from our case law." *Id.* at 321-22. "[A] need of the 'set of good example' genre [is not] sufficient to overwhelm a Fourth Amendment objection." *Id.* at 322.

3. The decision of the court below cannot be reconciled with *Chandler.* As the four dissenting judges recognized, *see supra* at 7-8, the Knox County Policy is purely symbolic, and "[n]othing in the record hints that the hazards [the Board and the court below] broadly describe are real and not simply hypothetical for [the Knox County schools]." *Chandler*, 520 U.S. at 319.

a. The *Chandler* Court emphasized that "[a] demonstrated problem of drug abuse, while not in *all* cases necessary to the validity of a testing regime," *id.* (emphasis added), is usually an integral part of any successful effort to "shore up an assertion of special need for a suspicionless general search program." *Id.* It is uncontested that there is no drug problem among Knox County's teachers. *See supra* at 4. Indeed, there is no evidence of any instance "in which a teacher or other employee responsible for children has allowed any harm to the children by being in an impaired condition while on the job," App. 38a, or of any instance in which "the inattentiveness or negligence of a teacher," *whatever* its cause, "has ever contributed to, or was related in any way to," a safety problem in any of the schools. App. 6a. *See supra* at 5.

b. Nor is there any evidence that the duties of Knox County teachers are of such a nature that undetected drug use would be likely to cause the safety problems the Board professes to fear.

The Board and the court below placed great emphasis on the responsibility of teachers to report observed drug use and other misconduct by students. *See* App. 5a, 30a,

37a, 49a. Whether this properly should be considered an integral part of a teacher's job is dubious in the first place. *Compare* App. 30a (declaring that "teachers . . . are perhaps in the best position to determine if a child is . . . involved with drugs"), *with Vernonia*, 515 U.S. at 663-64 (stating that the "function of spotting and bringing to account drug abuse [by students is] a task for which [teachers] are ill prepared, and which is not readily compatible with their vocation").[7] Be that as it may, the record contains nothing to suggest that drug use would render a teacher unable to observe or to report misconduct by students. Any speculation in that regard has no root in the actual experience of the Knox County school system, because "there is no record evidence that a teacher has ever failed to report a student for the use or possession of drugs, alcohol, or weapons."[8] App. 6a.

The other alleged "safety" functions of teachers were not described by the Board in any detail. There is no evidence, for example, as to the role teachers are expected to play if there is a fight between students, or if students are injured in an accident or in some other way. All that the Board offered on these points was a series of conclu-

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[7] *See also* App. 5a (citing testimony that, in the Knox County school system, the primary responsibility for reporting student misbehavior lies with administrators).

[8] The court below suggested that if teachers were "involved in" drugs, they might be unwilling to report student drug use, and "they themselves [might be] open to being compromised and undermined." App. 39a. Such speculation fails to justify suspicionless testing here, just as the testing in *Chandler* was not justified even as to public officials who were responsible for the state's "drug interdiction efforts." 520 U.S. at 311, 318. Whatever role teachers may play in reporting student drug use is hardly comparable to the "unique context," *id.* at 321, of *Von Raab*, where drug interdiction was the employees' primary mission, and where the employees dealt with criminals and had access to vast quantities of narcotics in performing their jobs. *See Chandler*, 520 U.S. at 321.

sory homilies about the value of a teacher's being "on her toes." *See* App. 5a and n.1.

Significantly in this regard, and in sharp contrast to *Skinner*, there is no evidence that the Knox County school system gives teachers any training, or even any instructions, regarding the performance of their supposed "safety" duties, or that the system takes any measures to ensure that teachers are physically fit to perform those duties. For all that appears, drug testing is the *only* measure taken by the Board for the ostensible purpose of ensuring that teachers will be equipped to protect the safety of students.

With no concrete evidence as to any actual safety duties performed by teachers, there obviously was no way for the court below to determine, on the record, that undetected drug use would be likely to render a teacher unable to perform such duties. *See Gonzalez v. Metropolitan Transportation Authority*, —— F.3d ——, 1999 U.S. App. LEXIS 7190, *15-16 (9th Cir. April 14, 1999) (reversing decision upholding suspicionless drug and alcohol testing of bus dispatcher and supervisor of bus driver trainees, because, *inter alia*, the record "does not show exactly what they do, and how being under the influence of alcohol or drugs when they do it might affect safety").

The court below professed to rely instead on what it characterized as "common sense and experience with life," App. 37a, and its "intuitive[] understand[ing]." App. 38a, n.23. Observing that "young children could cause harm to themselves or others while playing at recess, eating lunch in the cafeteria (if, for example, they begin choking) or simply while horsing around with each other," App. 37a, the court concluded, solely on the basis of its "intuitive understanding," that suspicionless drug testing is necessary to prevent such harms. App. 38a, n.23.

That conclusion, however, is "speculation, and not very plausible speculation at that." *Von Raab*, 489 U.S. at 682 (Scalia, J., dissenting). It obviously cannot be assumed, absent any evidence, that a teacher who takes Robitussin A-C cough syrup without a prescription,[9] or who uses some other substance covered by the Knox County Policy, *and whose conduct and demeanor are not such as to give rise to any suspicion of drug use*, will be unable to supervise horseplay or to assist a choking child. If suspicionless drug testing by the government must be based on evidence of "real and not simply hypothetical" dangers, *Chandler*, 520 U.S. at 319, the kind of speculation in which the Sixth Circuit indulged cannot provide a sufficient basis for such testing. *See, e.g., Gonzalez*, 1999 U.S. App. LEXIS 7190 at *16 (refusing to speculate as to safety functions that might be performed by bus dispatcher and how alcohol use might affect the performance of those functions).

c. Even if there were a basis for concluding that undetected drug use by teachers might in some circumstances endanger students, there is no ground for the Sixth Circuit's holding that *suspicionless* testing is necessary to avoid the hypothesized danger. In each of the decisions from *Skinner* through *Chandler*, this Court has recognized that, to sustain suspicionless testing, the government must show that "an important governmental interest . . . would be placed in jeopardy by a requirement of individualized suspicion." *Chandler*, 520 U.S. at 314, quoting *Skinner*, 489 U.S. at 624. *See supra* at 11, 12, 13-15. *See also Vernonia*, 515 U.S. at 674 (O'Connor, J., dissenting) (noting that in *Skinner* and *Von Raab*, this Court "upheld the suspicionless search only after first recognizing the

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[9] That is one of the medications that contains a substance for which the Knox County Policy tests. App. 43a.

Fourth Amendment's longstanding preference for a suspicion-based search regime, and then pointing to sound reasons why such a regime would likely be ineffectual under the unusual circumstances presented").

In apparent deference to this central requirement, the court below asserted that teachers are not subject to regular scrutiny by "their peers and others," but only by students, "some of whom are very young, who may or may not be able to detect drug use among teachers," and who, if they did detect such use, "would likely be wary of reporting such conduct." App. 30a-31a. However, these assertions again are based not on any record evidence, but on unsupportable assumptions and speculation.

Contrary to what the Sixth Circuit seems to have assumed, the position of a public school teacher is not even remotely similar to that of the Customs agents in *Von Raab*, who often worked without being observed by supervisors or others, and whose *off-duty* conduct was both relevant and unobserved. *See supra* at 12-13. Teachers are, as the Sixth Circuit acknowledged, under the constant observation of their students; and there is no basis for the Sixth Circuit's assumption that students will fail to detect and report suspicious behavior by a teacher. Furthermore, teachers constantly are observed in the classroom by their aides, and they frequently are observed in that setting by supervisors and parents. In addition, teachers spend extensive time in hallways, cafeterias, playgrounds, teachers' lounges, and other locations where they regularly interact with other teachers, supervisors and parents. The Sixth Circuit's own example of a child choking on food in the cafeteria, App. 37a, suggests the obvious rejoinder: if a teacher were so impaired by drug use as to be unable to assist such a child, it hardly is likely that the teacher's condition would have gone unnoticed.

d. As the four judges who dissented from the denial of rehearing *en banc* observed, the record in this case is so barren of evidence supporting a safety need for suspicionless testing that the panel opinion can only be seen as a "political statement" against drug use, App. 88a—or, as this Court put it in *Chandler*, a "symbolic" act. 520 U.S. at 322. The panel opinion virtually confesses this point: it dwells at length on the extent to which teachers may influence the perceptions and values of their students, App. 9a, 50a-51a, but makes no effort to explain how that has anything to do with the "safety-sensitivity" that is the supposed reason for the Knox County Policy.[10] Nor did the court below explain how its emphasis on these non-safety considerations can be squared with *Chandler's* admontion that "a need of the 'set a good example' genre [is not] sufficient to overwhelm a Fourth Amendment objection." 520 U.S. at 322.

4. In striking down a program under which teachers injured in the course of their employment were required to submit to drug testing, the Fifth Circuit summed up the situation in words that are equally applicable to this case:

> As destructive as drugs are and as precious are the charges of our teachers, special needs must rest on demonstrated realities. Failure to do so leaves the effort to justify this testing as responsive to drugs in public schools as a "kind of immolation of privacy and human dignity in symbolic opposition to drug use," that troubled Justice Scalia in *Von Raab*.

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[10] There is no evidence, nor does common sense suggest, that a teacher who uses some drug or medication covered by the Knox County Policy, but whose behavior does not give rise to any suspicion, will be a bad influence on students. In any event, schools have ample means to take action against any teacher who in fact influences students improperly; suspicionless drug testing is neither necessary nor efficacious to that end.

United Teachers v. Orleans Parish School Board, 142 F.3d 853, 857 (5th Cir. 1998), quoting *Von Raab*, 489 U.S. at 681 (Scalia, J., dissenting). *See also Patchogue-Medford Congress of Teachers v. Board of Education*, 70 N.Y.2d 57, 510 N.E.2d 325 (N.Y. App. 1987) (striking down urine tests of teachers being considered for tenure).[11]

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[11] Although the Board's failure to establish a "special need" for suspicionless testing is fatal in itself, *see supra* at 10, the Sixth Circuit's analysis is erroneous in two other important respects as well.

First, that court's conclusion that teachers have a diminished expectation of privacy, App. 45a-51a, misreads *Skinner* and *Vernonia*. Those cases emphasized that the employees (in *Skinner*) or students (in *Vernonia*) who were subject to drug testing were involved in activities that were heavily regulated *as to safety and as to the physical fitness of the individuals in question*, such that those individuals were subject to comprehensive medical examinations and other intrusions into the privacy of their physical functions. *See Skinner*, 489 U.S. at 627-28; *Vernonia*, 515 U.S. at 657. That is not the case here. Nor does the fact that teachers are required to report student misconduct, *see* App. 50a, or that teachers may function as role models, *id.*, afford any basis for concluding that teachers have reduced interests in personal privacy and in shielding their bodies from intrusion, as the court below erroneously concluded.

Second, the Sixth Circuit did not even ask whether the Knox County Policy was likely to accomplish its supposed purpose—a question that is crucial under this Court's precedents. *See Chandler*, 520 U.S. at 319-20; *Skinner*, 489 U.S. at 629-30. Although the Sixth Circuit's reasoning plainly would permit suspicionless testing of incumbent teachers, the Knox County Policy only covers *applicants*, who are tested during the window period between being hired and commencing work. App. 10a. *See also id.* at 51a ("it is a one-time test, with advance notice"). That an applicant, having advance notice, avoids drug use for that limited period says little about whether he or she will continue to abstain from drug use thereafter. As in *Chandler*, this policy is neither "well designed to identify" drug users nor "a credible means to deter [them] from seeking [teaching positions]." 520 U.S. at 319. *See also Gonzalez*, 1999 U.S. App. LEXIS 7190 at *16-20. Furthermore, the fact that

The court below indicated that this case raises "issues of significant import to our schools and communities." App. 2a. There can be no doubt on this score. The specific question whether public school teachers occupy positions that are "safety sensitive" so as to permit suspicionless drug testing is of importance not only to the Knox County school system and its teachers, but to school systems and teachers throughout the nation. In answering this question "yes," the court below has taken a position that is in conflict with this Court's teachings in *Skinner* and its progeny—including particularly *Chandler*. For this reason alone, certiorari is warranted.

But the Sixth Circuit's decison raises a related—and broader—question, and one as to which the Justices of this Court have expressed somewhat divergent views. *See supra* notes 5, 6 (discussing the dissents in *Von Raab* and *Vernonia*). This question concerns the type of evidentiary showing that must be made by the Government in order to justify suspicionless drug testing of employees. The fact that the Sixth Circuit was prepared to rely in this regard on its own "experience" and "intuitive understanding," as opposed to record evidence, indicates a serious misunderstanding of this Court's teaching with regard to this important question of Fourth Amendment jurisprudence. The instant case offers an appropriate and timely opportunity to provide further—and much needed —guidance.

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a teacher with a lawful prescription for a medication containing a covered substance is allowed to hold a "safety-sensitive" position without regard to the medication's possible effects, *see supra* at 4, is further proof that the Knox County Policy is neither aimed at ensuring safety nor designed to accomplish that end.

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be granted.

Respectfully submitted,

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